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No. 76-482

In the Supreme Court of the United States

OCTOBER TERM, 1976

FRANK A. RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner challenges the decision of the Court of Claims in this income tax case construing his written agreement to waive the statute of limitations for assessment of taxes and holding that the Commissioner's assessment against him was timely. It is undisputed that if the assessment was timely, petitioner is liable for the tax.

The pertinent facts are as follows: On December 12, 1970, petitioner signed a written agreement form to extend until June 30, 1972, the period during which the Commissioner could make a timely tax assessment for 1967. Without this agreement, the period of limitations would have expired on April 16, 1971, in accordance with Section 6501(a) of the Internal Revenue Code of 1954 (26 U.S.C.), which generally provides a three-year period of limitations for assessments. The waiver agreement signed by petitioner provided in part as follows (Pet. 3):

> [The taxpayer and the government consent and agree that] * * * [additional taxes] may be assessed at any time on or before June 30, 1972 except that if a notice of a deficiency in tax is sent to the taxpayer (or taxpayers) by certified or registered mail on or before that date, then the time for making any assessment shall be extended beyond that date by the number of days during which an assessment is prohibited and for sixty days thereafter.

On March 14, 1972, the Commissioner of Internal Revenue sent petitioner a notice of deficiency; on September 4, 1972, he assessed the additional taxes in issue and thereafter collected them (Pet. App. A 2).

1. Petitioner agrees that under the waiver agreement, the June 30, 1972, limitation date was extended as a result of the issuance of the notice of deficiency. It is also undisputed that the extension was for 150 days.[1] The only question is when the 150-day period began to run.

Petitioner contends (Pet. 3-4) that the period began to run on March 14, 1972, when the notice of deficiency was issued, thus extending the period to August 11, 1972. If this is the correct date, the September 4, 1972, assessment would be barred. The Court of Claims upheld the government's contention that under the waiver agreement, the 150-day period began to run on June 30, 1972, so

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[1]As the Court of Claims noted (Pet. App. A 4), assessments are generally prohibited for 90 days following the issuance of a notice of deficiency (see Section 6213(a) of the Code). The 150-day period referred to above is the sum of this 90-day period and the 60-day period referred to in the waiver agreement.

that the limitations period was extended to November 27, 1972. Accordingly, the September 4, 1972, assessment was timely.

The Court of Claims correctly construed the waiver agreement. That agreement extends the time for assessment to June 30, 1972, and provides for an extension of "that date" for the 150-day period established under the agreement if a notice of deficiency is issued. The Court of Claims concluded that the term "that date" refers not to the date the deficiency notice was issued but to June 30, 1972. The court properly relied on the fact that the term "that date" is contained a second time in the same sentence of the waiver agreement in which it unmistakably refers to June 30, 1972. The court further noted that June 30, 1972, is the only date specified in the agreement (Pet. App. A 5).

Petitioner's construction of the agreement would accord two different meanings to the term "that date" in the same sentence. Since the agreement does not expressly support such an anomalous interpretation, the Court of Claims correctly held that the statute of limitations was extended until November 27, 1972, 150 days after June 30, 1972, and that the assessment made on September 4, 1972, was timely.

2. Contrary to petitioner's assertion (Pet. 7), the decision of the Court of Claims does not conflict with *Hoosac Mills Corp.* v. *Commissioner*, 75 F. 2d 462 (C.A. 1). There, the taxpayer signed a waiver agreement extending the statute of limitations to December 31, 1926, with a proviso that "said date" should be extended by a certain period if a notice of deficiency were issued and the taxpayer appealed to the Board of Tax Appeals. Thereafter, the Commissioner sent a timely notice of deficiency and the taxpayer appealed to the Board. As

the Court of Claims held here, the court in *Hoosac Mills* similarly computed the additional limitations period from the original December 31, 1926, limitations date set by the waiver agreement, and not from the date when the deficiency notice was issued. Thus, in this respect, *Hoosac Mills* supports, rather than conflicts with, the decision below.

Since the assessment in *Hoosac Mills* was not made until after the date so computed (April 9, 1932) under the waiver agreement, the court also considered whether Section 277(b) of the Revenue Act of 1926, 44 Stat. 58, (now Section 6503(a)(1) of the 1954 Code), might have affected the "plain language of the waivers" (*id.* at 463). That statute provides for a statutory suspension of the limitations on assessments in cases where a notice of deficiency is issued. The court held that where the period of limitations is extended by a waiver agreement and a notice of deficiency is issued, thereby suspending the running of the limitations period for a specified time, the limitations period may not be further extended by adding the unexpired portion of the limitations period onto the end of the suspension period.

Unlike *Hoosac Mills*, the assessment here was timely under the date computed under the waiver agreement. Thus, this case does not involve the statutory suspension of the running of limitations period considered in *Hoosac Mills*. While the Court of Claims indicated that it would not follow *Hoosac Mills* had a Section 6503(a)(1) question been presented (Pet. App. A 8-9), that expression of disagreement does not present a conflict of decisions warranting review by this Court.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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